Intervening Plaintiffs-Appellants or Intervening Plaintiffs) appeal from an order of a statutory three-judge court of the United States District Court for the Southern District of New York, dismissing their complaints which sought to enjoin, set aside and annul a final order of the Interstate Commerce Commission (hereinafter "Commission" or "ICC") dated January 23, 1969, which authorized the railroads of the United States (hereinafter "railroads") to put into effect varying freight rate increases on virtually all commodities transported in a total amount of some $440 million annually. Plaintiffs and Intervening Plaintiffs submit this statement to demonstrate that the Supreme Court has jurisdiction and that substantial questions are presented, which require either summary reversal in view of *City of Chicago, et al.* v. *U. S., et al.*, 38 U.S.L.W. 4039 (Dec. 9, 1969), with direction to the court below to hear Appellants' case on the merits, or the presentation of full briefs and oral argument to this Court.

Opinion Below

The opinion of the court below is not yet officially reported. The opinion is submitted herewith as Appendix A.

Jurisdiction

This suit in the United States District Court for the Southern District of New York was commenced on February 28, 1969, under 28 U.S.C. §§1336, 2284 and 2321-25 to enjoin, set aside and annul a final order of the Interstate Commerce Commission dated January 23, 1969. The order of the District Court sought to be reviewed here was dated October 28,

1969 and was entered on that day. The notice of appeal of that order was filed in the District Court on December 18, 1969. The jurisdiction of the Supreme Court is conferred by 28 U.S.C. §§1253 and 2101(b), and is sustained by *Burlington Truck Lines, Inc.* v. *U. S.*, 371 U.S. 156 (1962).

Questions Presented

The questions of law presented on this appeal will not only affect every consumer of railroad-transported commodities in the United States, but raise broader questions of judicial review of administrative action, which this Court, in the *City of Chicago* case, appears to have dealt with in a manner contrary to the decision below.

1. Is the decision below, holding that shippers (or state agencies representing shippers) may not obtain court review of the final order resulting from an ICC investigatory hearing pursuant to 49 U.S.C. §15(7),* at variance with the principles of judicial review of administrative action set forth in this Court's opinion in *City of Chicago, supra,* in which case the Court stated, among other things:

* 49 U.S.C. §15(7). "Whenever there shall be filed with the Commission any schedule stating a new . . . rate, . . . the Commission shall have, . . . authority, either upon complaint or upon its own initiative, . . . to enter upon a hearing concerning the lawfulness of such rate, . . . and pending such hearing and the decision thereon, . . . may . . . suspend the operation of such schedule, . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect; and, after full hearing, . . . the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective . . . . At any hearing involving a change in a rate, . . . the burden of proof shall be upon the carrier to show that the proposed rate . . . is just and reasonable . . ."

"When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. §15(7). Where the Commission finds the proposed rates lawful, its order reads 'the investigation proceedings [are] discontinued'. . . . *Such orders are reviewable.* . . ." (Emphasis added.)*

2. Regardless of whether the *City of Chicago* decision is deemed to be controlling of the instant proceeding, when the ICC conducts an investigatory hearing pursuant to 49 U.S.C. §15(7), is the court below in error in holding that there can be no judicial review of the procedures followed by the ICC during that hearing and of the final order resulting therefrom?

3. Did the court below err in dismissing, on motion for legal insufficiency, which assumed the correctness of the facts alleged, complaints seeking to set aside such an order of the Commission when Plaintiffs' complaint alleged that such order was entered after an investigatory hearing in which there was:

(a) no representation of the public interest by Commission staff, counsel, or otherwise;

(b) no evidence that the new rates would be just and reasonable;

(c) no evidence by the railroads as to their costs for providing transportation services for any commodity; and

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*The *City of Chicago* decision is also believed to be at variance with the decision of the U. S. District Court for the District of Columbia in *Alabama Power Co., et al.* v. *U. S., et al.*, December 4, 1969, F.Supp. , a case arising from the same order of the Commission which is here appealed.

(d) uncontroverted evidence that such increased rates would adversely affect the movement of traffic;

and Intervening Plaintiffs' complaint alleged, *inter alia*, that the Commission arbitrarily refused to consider cost studies which showed disproportionately high contributions to rail revenues on traffic subjected to relatively high percentage increases, and refused to find undue prejudice to the Northeast based on a misconception of the percentage increase actually authorized in the South?

Statement of Facts

In the court below, Plaintiffs' and Intervening Plaintiffs' complaints were dismissed on motion by the Commission, supported by the railroads, on the ground that such complaints failed to state a claim upon which relief could be granted. In effect, the court held that no matter how wrong the Commission's decision was, that decision was immune from judicial review.

The Department of Justice, on behalf of the United States, a mandatory defendant herein, has consistently declined to participate in the case.

It is of the utmost importance that this Court realize that Plaintiffs and Intervening Plaintiffs were not and are not seeking to have the court below or this Court determine the justness and reasonableness of increases in freight rates on any specific commodity. What these Appellants were and are seeking is a review of the methods and procedures used by the Commission and the evidence, or lack of it, underlying its authorization for such rates to become effective, and its findings that the increased rates

proposed by the railroads would be just and reasonable, and would not adversely affect the movement of traffic.

It is Appellants' position that the record contained no support for the Commission's conclusion that the rates were just and reasonable; nor for its determination that such rates would not adversely affect the movement of traffic; and, further, that the Commission erred in failing actively and affirmatively to serve consumers by itself investigating the proposed rates and making the expertise of its staff and the voluminous statistical data in its files available for the development of a proper record. The Commission refused to consider uncontroverted cost studies showing the rail revenue contribution of traffic on which it authorized relatively high percentage increases. It further refused to consider the actual percentage increases authorized on grain in the South in determining whether the Northeast was subjected to undue prejudice. In the absence of a record adequate to support its affirmative findings, the Commission was required by the Interstate Commerce Act, by the Administrative Procedure Act and by constitutional requirements of due process to disapprove the proposed increased rates. Since the inadequacies of the record specified in the complaint were conceded by defendants by the motion they made in the court below, the sole issues are whether the Commission's order was lawful and whether that order is reviewable. The lawfulness of the order was not determined by the court below; its decision related solely to non-reviewability.

The facts which gave rise to the instant case are set forth in Plaintiffs' complaint. By their motion to dismiss that complaint, defendants of necessity admitted those facts, which are:

In March, 1968, the defendant railroads filed with the Commission "Master Tariff X-259" which provided for rate increases on virtually all commodities carried by the railroads (¶ 6);* such increases varying by commodity, and in some instances, by region, from 3% to 10% (¶ 6). After receiving numerous protests, by order of June 19, 1968 the ICC allowed an interim increase of 3% on all commodities; suspended the tariff, and ordered investigatory hearings on the proposed increases (¶ 6). (This order of June 19, 1968 is not under review here.)

By its order of January 23, 1969, the Commission ordered that "this proceeding be, and it is hereby, discontinued" (332 I.C.C. 714, 793), and permitted the railroads to put into effect virtually all of the increases set forth in Master Tariff X-259. The Commission specifically found the increased rates "just and reasonable"; that they "will not exceed a maximum reasonable level" and that they "will have no undue adverse effect on the movement of traffic." (332 I.C.C. at 792)

At the hearings, to which Plaintiffs and Intervening Plaintiffs were parties, there was no evidence presented in support of the justness and reasonableness of the proposed rates. The Commission did not itself affirmatively examine into the justness and reasonableness, or any other aspects, of the proposed increases (¶ 9). No Bureau, Section or employee of the Commission was a party to the proceedings; nor was there any representation of the national consumer interest by the Commission through its counsel or otherwise (¶ 10). There was no evidence presented by the railroads as to their costs for providing the transportation services for any commodity, although such evidence was requested by Plaintiffs, Intervening Plaintiffs and many other parties to the proceeding. All

* Numbers refer to paragraphs in Plaintiffs' complaint; additional facts set forth in Intervening Plaintiffs' complaint follow.

such requests were repeatedly refused by the railroads and such refusals were upheld by the Commission (¶12). There was no evidence in the record to refute evidence presented by shippers that substantial loss of traffic would result if the proposed increases became effective (¶13). There was no evidence presented by the railroads to justify increases of 3% on some commodities, 5% on others, and 10% on still others (¶14). However, there was substantial and uncontroverted evidence presented by shippers, including Plaintiffs and Intervening Plaintiffs, that some commodities, prior to the imposition of the requested increases, produced a disproportionate return to the railroads over and above the cost to them of providing the transportation service for that traffic (¶14).

In addition to the general findings which the Commission made with respect to all increases, it also made specific findings with respect to bituminous steam coal, and feed and grain. It based its findings as to the effect of the proposed rates on the movement of coal traffic on its opinion that "costs of other forms of transportation, and of competing fuels are also increasing" (332 I.C.C. at 734), for which opinion there was no supporting evidence; and upon the explicit assumption that "should a competitive situation arise, appropriate adjustments can be made by producers and carriers", although there was not a scintilla of evidence in the record to support the assumption that "adjustments can be made by producers". (332 I.C.C. at 734, ¶ 13.)

As to grain, the Commission refused to consider a cost study submitted by Intervening Plaintiffs, which demonstrated that that traffic showed a disproportionately high contribution to rail revenues before the requested increases were imposed upon that traffic. (Intervening Plaintiffs' complaint, ¶ 10(a).)

The Commission's order holding that Intervening Plaintiffs suffered no undue prejudice was based on

a misconception concerning the percentage increase authorized in other regions. (Intervening Plaintiffs' complaint, ¶ 10(c).)

ARGUMENT

I.

The Decision Below Denying Review Conflicts With This Court's Decision in the *City of Chicago* Case.

On December 9, 1969, Mr. Justice Douglas, writing for a unanimous Court, in *City of Chicago, et al.* v. *U. S., et al.*, 38 U.S.L.W. 4039, a case reviewing orders of the Interstate Commerce Commission relating to the discontinuance of train passenger service, held that once the Commission decides to conduct an investigatory hearing, it must then conduct it properly and that its resulting decision is reviewable.

> "A decision to investigate indicates that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency 'action', while an answer saying the reverse is agency 'inaction.' The technical form of the order is irrelevant. In each case the Commission is deciding the merits." 38 U.S.L.W., at 4040.

The Court then cited its earlier decision in *Rochester Telephone Corp.* v. *U. S.*, 307 U.S. 125 (1939).

In this case, the ICC's January 23rd order, which discontinued its investigation into the proposed increases, authorized the railroads to put those increases into effect immediately, and thereby immediately affected Appellants'

rights.* Thus, the *Rochester Telephone* decision and the two additional decisions discussed immediately below, are directly on point.

Rochester Telephone was an appeal from a final decree by a three-judge district court dismissing on the merits a bill to review an order of the Federal Communications Commission, which order had found Rochester subject to FCC jurisdiction. Justice Frankfurter, writing for the Court, found that the FCC order was reviewable because it

> "was not a mere abstract declaration regarding the status of the Rochester under the Communications Act [footnote omitted], nor was it a stage in an incomplete process of administrative adjudication." (307 U.S. 125, 143.)

The judgment rendered was a " 'final and indisputable basis of action as between the Commission and the defendant' " (307 U.S. 125, 143). Justice Frankfurter noted that such an order could be reviewed to determine "questions affecting constitutional power, statutory validity and the basic prerequisites of proof." (307 U.S. 125, 140.) Those are the very questions which this Court is now asked to pass on in the instant case.

The scope of reviewability set in the *Rochester* case has been expanded by two more recent cases in addition to *City of Chicago, supra.* Those cases, like the instant appeal, also arose under the Urgent Deficiencies Act: *Columbia Broadcasting System* v. *U. S.*, 316 U.S. 407 (1942), and *Frozen Food Express* v. *U. S.*, 351 U.S. 40 (1956).

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* The proposed increases were in fact put into immediate effect by the railroads.

In the *CBS* case, the Federal Communications Commission had issued a rule providing for the non-renewal or revocation of licenses of stations whose contracts with a broadcasting network contained certain prescribed conditions. The Court held the FCC regulation a reviewable "order", even though it did not formally apply to CBS, and no contracts or licenses had been cancelled. In deciding that review was possible despite this seeming lack of finality, the Court said:

> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it." 316 U.S. 407, 420.

In *Frozen Food Express,* the express company, a motor carrier not a party to the prior administrative proceeding, instituted a suit in a statutory three-judge court to have findings and order of the Interstate Commerce Commission enjoined and set aside. The findings related only to the status of certain agricultural commodities which Frozen Food often carried. The order would have made it necessary for Frozen Food to obtain a certificate of public convenience and necessity, where its carriage before the order was exempt. The mere possibility that the Commission might issue a cease-and-desist order and the legal consequences thereof were held by the Court to make this determination a reviewable order.

Furthermore, the above cases make clear that the existence of hollow procedural rights (e.g., filing a complaint procedure in the ICC pursuant to 49 U.S.C. §13*) does not preclude review of an order in which the agency has decided all real substantive rights. We stress that to require the plaintiffs to proceed before the Commission pursuant to Section 13 amounts to denying them any effective relief. Our research has failed to disclose a single instance where any shipper has obtained any adjustment in rates made effective following an order of the Commission made in a general revenue proceeding, such as the one of which review is here sought.**

In *City of Chicago,* the Court analogized to situations such as the instant case, where new rates have been filed, stating, as previously noted:

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* Section 13(1) of the Interstate Commerce Act reads:

"(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

** See discussion of *Koppers* case at p. 16, *infra.*

> "When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. §15(7). Where the Commission finds the proposed rates lawful, its order reads 'the investigation proceedings [are] discontinued.' . . . *Such orders are reviewable. . . .*" (Emphasis added)

It appears, therefore, that the decision below and the decision of the U. S. District Court for the District of Columbia in *Alabama Power Co., et al.* v. *U. S., et al.*, are incorrect, *supra*. This Court has stated that orders of the Commission entered after investigation are reviewable. The court below should be advised by this Court of its error in finding otherwise.

The Dissent in the *Alabama* Case

Hon. J. Skelly Wright, a Judge of the District of Columbia Circuit Court of Appeals, sitting on the statutory three-judge court in the District of Columbia case, *Alabama Power Co., et al.*, v. *U. S., et al.*, referred to, *supra*, dissented from the opinion of the majority there, holding that that Court should have decided whether the Commission's action was supported by substantial evidence. He noted, correctly, that Plaintiffs were not seeking review of any rates, which review could be obtained by filing a Section 13 complaint, but rather were challenging the propriety of the Commission's order *in toto*. He found that Plaintiffs were aggrieved parties under the terms of the Administrative Procedure Act.

Judge Wright further correctly held:

> "Considering challenges to the general order now would avoid needless relitigation of the same issue

before the Commission in countless [§13] rate-making proceedings involving individual commodities."

Therefore, this Court could properly summarily reverse the decision of the court below, and order it to hear the case on the merits, on the grounds that the issues raised by the instant case were resolved by the principles cited as controlling by this Court in *City of Chicago* v. *U. S.*, *supra*. Judge Wright's dissent, *supra*, also supports such a summary reversal.

II.

The Commission's Order Is Reviewable.

If this Court should find that *City of Chicago* is not directly controlling of the instant case, it is submitted respectfully that it should note probable jurisdiction and order Appellants to present briefs and oral argument because of the substantial questions of law involved.

If the decision below is permitted to stand, it means that an order of the ICC permitting the railroads to increase freight rates by millions of dollars annually may not be judicially reviewed,* regardless of whether, as Appellants here contend, such order violates shippers' constitutional rights and their statutory rights under the Administrative Procedure Act and the Interstate Commerce Act. It is

* Apparently the ICC regarded the decision below as approval of the illegal procedures which it followed in this proceeding. Subsequent to the Southern District's decision which is here appealed, it decided to allow the railroads to increase their freight rates by some additional $660 million annually in a proceeding (*Ex Parte 262 Increased Freight Rates, 1969*, —— I.C.C. —— (November 17, 1969)) in which no evidence on justness and reasonableness was even allowed to be submitted, despite shippers' pleas to permit them to present their case.

submitted that to so hold is in clear violation of fundamental concepts of justice and of judicial review.

It must be borne in mind that the procedure suggested by the District Court does not constitute an avenue of review of the ICC's final order of January 23, 1969. What the District Court suggests (without citation of authority) is that an additional proceeding be brought before the Commission under Section 13 of the Interstate Commerce Act (49 U.S.C. §13) in which the Plaintiffs could "preserve the objections which they now assert to the procedure leading up to the general revenue order."

However, a Section 13 proceeding would be directed solely to the justness and reasonableness of specific rates. It would be impossible, in any appeal from such a proceeding, for a plaintiff to complain of errors in the prior general revenue proceeding, such as, e.g., failure of the Commission staff to participate.

Further, it is Plaintiffs' contention that they should not be directed to assume the burden of instituting a Section 13 proceeding until the carriers have borne their statutory burden of proof in a properly conducted revenue proceeding.* The failure of the carriers to sustain their burden of proof becomes moot once the Section 13 proceeding is instituted, as the Commission itself has held in a prior case, wherein other shippers attempted to follow what the court below has suggested:

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* In its final order of January 23rd, the Commission found proposed increases on certain commodities unlawful, such as those on shelled walnuts, potash and fly ash, thereby belying any intent to relegate all shippers for relief from the increased rates to Section 13 procedures.

"Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that [general revenue] proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." *Koppers Co. Inc.* v. *Chesapeake & O. Ry.*, 303 I.C.C. 383, 387 (1958).

Statutes Require Review

The Urgent Deficiencies Act, now embodied in 28 U.S.C. §1336, provides:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." 62 Stat. 931.

There is no contention here that Congress made any other provision for judicial review of the ICC's order of January 23, 1969, the order challenged here and in the District Court below, neither is there any question that Appellants properly complied with the procedures set forth in 28 U.S.C. §§2321-2325 relating to actions in district courts to enjoin orders of the ICC.

The Administrative Procedure Act, 5 U.S.C. §702, provides that

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Plaintiffs are adversely affected by the Commission's order because it requires them to pay more than $2 million

additional in annual freight bills after a proceeding in which their constitutional and statutory rights were violated. Intervening Plaintiffs are adversely affected because the increase in the rail freight rates on feed and grain resulted in an additional burden on Northeastern agriculture of more than $2.4 million annually, and their rights were similarly violated in the same proceeding.

Section 706 of the Administrative Procedure Act provides that:

"... The reviewing court shall

(2) hold unlawful and set aside agency action, findings, and conclusions found to be— ...

(B) contrary to constitutional right ...

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence ..."

Appellants' complaints demonstrated that the Commission's order was contrary to constitutional right, was made without observance of procedure required by law and was unsupported by substantial evidence. The respects in which that order so violates Appellants' right are set forth *infra* under Point III.

With regard to the paramount importance of the availability of judicial review of administrative action in order to protect constitutional rights, Mr. Chief Justice Berger, writing in *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964), held that:

"Action challenged as a denial of due process—whether substantive in the sense of being arbitrary or by capricious classification, or procedural in the

sense of denying minimum safeguards—could be immune from judicial review, if ever, only by the plainest manifestation of congressional intent to that effect." 334 F. 2d 570 at 575 (1964) *cert. den.* 381 U.S. 904 (1965).

This same principle of the right of aggrieved parties to judicial review of administrative action has been reiterated by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 at 140 (1967), where this Court stated:

"... . [A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." [Citing cases.]

This Court further observed in that case that this principle was reinforced by the enactment of the Administrative Procedure Act, which embodied the

"basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. §701 (a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is not other adequate remedy in a court,' 5 U.S.C. Sec. 704." 387 U.S. 136, 140.

The Constitution Requires Review

The methods of the Commission in arriving at its decision, which are discussed below, were a clear violation of its

own enabling statute and of the Administrative Procedure Act. Therefore, the resulting order, placing an additional, undue burden on Appellants, of millions of dollars annually in freight rates, violates their Constitutional rights to due process.

The Constitution condemns all "arbitrary exercise of power", *ICC* v. *Louisville & N.R.R.*, 227 U.S. 88, 91 (1913). In 1965, this Court declared that "delegated power, of course, may not be exercised arbitrarily" *FCC* v. *Schreiber*, 381 U.S. 279, 292 (1965), thereby holding consistently with its opinions as far back as 1886 when it held that there is no place in our constitutional system for the exercise of arbitrary power, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

It is submitted that the methods and procedures of the Commission in conducting the hearing below, including its failure to require the railroads to sustain their burden of proof, the making of findings without evidentiary support, and its own complete lack of participation in the proceedings, make its ultimate decision arbitrary and illegal. In effect, the Commission stood silently on the sidelines, while the railroads, in their usual unified fashion, recited an alleged overall need for additional revenues. The shippers and consumers of the nation, with their differing interests, by their objections, proffered evidence, briefs and oral argument, sought to make clear to the ICC that to permit the railroads to increase their rates on this basis alone was contrary to law. The Commission blandly ignored the evidence so presented, and proceeded to make findings and an order denying their rights to due process. This Court is now requested to reverse and remand the decision below, so that the ends of justice will be served, not only in this proceeding, but in future ICC proceedings.

The *Algoma Line of Cases is not Controlling**

The court below decided that Appellants' complaints should be dismissed because of prior district court decisions** holding that shippers affected by a general rate increase must bring a Section 13 complaint in the ICC. Thus, the court mistook the nature of Appellants' complaints in the instant case—they were not and are not complaining about any specific rates, but of the methods used by the Commission in arriving at its order permitting the increases. Plaintiffs in the three cases relied upon, however, *were* complaining about specific rates, and, therefore, the remands to Section 13 proceedings were correct.*** In *Algoma,* the subject of the requested judicial review was the failure of the Commission to suspend new rates, a matter found to be within the exclusive discretion of the Commission, 11 F. Supp. 495-496.

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* *Algoma Coal & Coke Co.* v. *U. S.*, 11 F. Supp. 487 (E.D. Va., 1935).

** *Algoma, supra; Koppers Co.* v. *U. S.*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission* v. *U. S.*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd. per curiam,* 352 U.S. 1021 (1957).

*** It should be noted however, that in at least two of these cases, *Algoma* and *Florida Citrus,* the reviewing court did look into the evidence to determine if the Commission had acted properly. This fact is noted by Judge Wright in his dissent in the *Alabama* case, *supra.* He finds that *Algoma* and *Florida Citrus* do sanction the type of preliminary review sought here.

III.

The Commission's Order Is in Error Because It Violates the Constitutional and Statutory Rights of Appellants.

It appears that the decision below considered only the question of reviewability and assumed the errors in the ICC's procedures and order which were alleged in the complaints. Therefore, Appellants will summarize the errors alleged only to the extent necessary to demonstrate that such errors, assumed by the court below, were substantial. This Court is respectfully referred to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss and Intervening Plaintiffs' Memorandum in the court below for a fuller discussion of the following alleged errors.

1. The Commission delegated to the carriers its statutory duty to determine whether the increased rates would adversely affect the movement of traffic.

2. The Commission made findings as to justness and reasonableness without any evidentiary support.

3. The Commission failed to itself affirmatively develop an adequate record.

4. The Commission failed to enforce the burden of proof requirements of its own statute and of the Administrative Procedure Act.

5. The Commission erred in refusing to determine the lawfulness of the rates by regions or groups of carriers rather than by the railroad industry as a whole.

6. The Commission erred in refusing to consider cost studies showing the revenue contribution of various commodities on which it authorized relatively high percentage increases.

7. The Commission erred in relying on a misconception of the percentage increases actually authorized in the South in determining whether the Northeast was subject to undue prejudice.

8. The Commission refused to consider applicable statutory standards, including the Hock-Smith Resolution, 49 U.S.C. § 55.

9. The Commission refused to consider and give appropriate weight to economic conditions in Northeastern agriculture, while according such consideration to other industries.

IV.

Conclusion

Appellants herein request this Court either to summarily reverse the decision below relying on the principles of the *City of Chicago* case, and direct the Southern District Court to hear the case on the merits, or to permit briefs and oral argument on the substantial questions concerning judicial review of administrative action which this appeal presents.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Three-judge Court

69 Civ. 800

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,

Plaintiffs,

—and—

STATE OF NEW YORK, *et al.*,

Intervenor-Plaintiffs,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

—and—

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,

Intervenor-Defendants.

Before:

KAUFMAN, *Circuit Judge,*
BONSAL and MCLEAN, *District Judges.*

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McLEAN, *District Judge*:

Seven public utilities operating in the northeastern section of the United States brought this action to enjoin and set aside an order of the Interstate Commerce Commission made on January 9, 1969, in a proceeding entitled "Ex Parte 259, Increased Freight Rates, 1968." The order permitted the Class I railroads of the United States to put into effect a rate increase on a great number of commodities. Among the rate increases so authorized was an increase of 5 per cent on bituminous steam coal, up to a maximum of 15¢ per ton. Plaintiffs are large users of bituminous steam coal and hence are adversely affected by the order. They claim that the order is unlawful and that the procedures employed by the Commission have deprived them of due process of law.

The State of New York and the Departments of Agriculture of ten other northeastern states have been permitted to intervene as parties plaintiff. They complain of the increase of 6 per cent authorized by the order in freight rates on grain, feed and feed ingredients moving into the northeastern states.

Many Class I railroads have also been permitted to intervene. They support the Commission's order.

The Commission has moved under Rule 12(b)(6) to dismiss the action on the ground that plaintiffs and intervenor plaintiffs have failed to state a claim upon which relief can be granted. In essence, the Commission asserts that the attack upon its order is premature. Decision of this question requires analysis of the Commission's order and consideration of the remedies available to plaintiffs and intervenor plaintiffs under the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.*

The various steps in the proceeding before the Commission which resulted in the order under attack are set forth in two reports of the Commission, an interim report dated November 25, 1968 (332 I.C.C. 590), and a final report dated January 9, 1969 (332 I.C.C. 714). They may be briefly summarized as follows.

On March 7, 1968, the Class I railroads filed with the Commission a petition for permission to publish increased freight rates. The Commission granted their request. On March 11, 1968, the railroads filed their master tariff X-259 containing schedules of proposed increases, to be effective on May 27, 1968. The effective date was later postponed to June 24, 1968. The proposed increases ranged generally from 3 to 10 per cent, depending upon the commodity involved. By order entered June 19, 1968, the Commission suspended until January 24, 1969 all increases in excess of 3 per cent. This order also directed that an investigation be made of the proposed increases.

The investigation was divided into a number of parts, designated as "sub-numbers." "Sub-No. 2" was concerned with "railroad cost and revenue need." Other sub-numbers pertained to the increases requested on particular commodities. Sub-No. 3 was concerned with coal; Sub-No. 5 with grain. Hearings were held before hearing examiners. Plaintiffs and intervenor plaintiffs appeared and protested the proposed increases.

The Commission's interim report dated November 25, 1968 was devoted to the need of the railroads for increased revenue, *i.e.*, Sub-No. 2 of the proceeding. The Commission concluded that "the proposed rate level, generally speaking, is within the zone of reasonableness." 332 I.C.C.

at 608. The Commission went on to find that "the increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges." 332 I.C.C. 609.

It further found:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 609.

By order dated November 25, 1968, the Commission vacated its suspension order of June 19, 1968 and permitted the full increases proposed by the railroads to take effect, except as to certain commodities, one of which was grain. As to these, the suspension order was continued.

At the beginning of its final report dated January 9, 1969, the Commission referred to its interim report of November 25, 1968, and stated that the proceeding had been continued thereafter "for the consideration of the lawfulness of the proposed and interim increases as they applied to specific commodities and services, and of the evidence and arguments of all parties with respect thereto." 332 I.C.C. 714.

The Commission then remarked:

"Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed." 332 I.C.C. 715.

The Commission went on to say:

"We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370." 332 I.C.C. 715.

The report then discussed at length the contentions of the parties with respect to proposed increases for various commodities or groups of commodities. With respect to a few of them, not including coal or grain or feed moving to the northeast, the Commission denied the full increases requested by the railroads. As to the others, the railroads' request was approved. As far as material here, the Commission's *ultimate conclusions* and findings were: (1) there is a critical need on the part of the railroads for additional revenue to offset, in part, increased operating costs; (2) the basic freight rates may be increased generally in accordance with master tariff X-259; (3) the increased freight rates will not exceed "a maximum reasonable level"; (4) "Our findings as to justness and reasonableness . . . will apply

to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction." 332 I.C.C. 792.

The Commission's order dated January 9, 1969, based upon this report, provided, in a somewhat back-handed fashion, that the railroads were directed to cease and desist from collecting basic rates "increased to a greater extent than found just and reasonable herein . . ." 332 I.C.C. 793.

It is apparent from this recital that the proceeding before the Commission was a general revenue proceeding. The Commission was concerned primarily with the "need, in the public interest, of adequate and efficient railway transportation service" and with the railroads' "need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 49 U.S.C. § 15a(2). The increases in rates were general, even though the percentage of increase varied from commodity to commodity. The new rates were "carrier-made," that is to say, the Commission merely authorized the railroads to put the increases into effect, it did not require or prescribe them. It is true that the Commission found these general increases, on an overall basis, to be just and reasonable. But the Commission did not purport to pass upon individual rates as contrasted with the general level. It neither prescribed nor specifically authorized a particular rate on a particular commodity, say coal or grain, from a specific point of origin to a specific destination.

If plaintiffs wish to complain of the reasonableness of a particular rate on the coal that is transported to them from a particular point of origin, they have the right to apply to the Commission under 49 U.S.C. §§ 13 and 15

to prescribe a different rate. The intervenor plaintiffs have the same right as to the rates on grain and feed with which they are concerned. This is what the Commission referred to in stating that its findings would not preclude interested parties from bringing any maladjustments to the Commission's attention. Neither plaintiffs nor intervenor plaintiffs have instituted such a proceeding. The nub of the present controversy is whether or not they must do so before seeking review of the Commission's general revenue increase order.

The Commission argues that plaintiffs and intervenor plaintiffs are attacking the rates on coal and grain respectively, and that this court should not hear them at this time. The Commission contends that the two sets of plaintiffs must first exhaust their remedies under Section 13. If they do, it may turn out that the Commission will heed their protests and will adjust the rates which directly affect them. In that event, their complaint will be satisfied and there will be no need to consider the propriety of the general increase order. Plaintiffs and intervenor plaintiffs, on the contrary, say that in this action they are not attacking the rates on coal and grain as such. They say that they are complaining of the entire order, on the ground, to put it simply, that the Commission acted illegally in making it. They contend that this court should hear them now, without putting them to the trouble and expense of making an application to the Commission under Section 13, an application which may prove to be futile.

It is true that on the face of the complaint, plaintiffs do challenge the entire order and the Commission's conduct of the entire proceeding, not merely the part of it which relates to coal. Although the complaint does not

allege that the Commission erred in finding that the railroads need increased revenues, it does assert that the Commission acted "without evidence in the record as to the justness and reasonableness of such rates." It alleges a number of respects in which the Commission acted improperly, *i.e.*, in not making its Bureau of Accounts a party to the proceeding, in failing to order its examiners to make preliminary decisions, in failing to afford plaintiffs an opportunity to propose findings and conclusions, in failing to require the railroads to submit evidence of cost, in making findings on the basis of unsupported opinion, et cetera.

The intervenors' complaint alleges that the Commission "erred" and "acted arbitrarily, capriciously and abused its discretion" in a variety of ways. For example, the complaint asserts that the Commission rejected evidence that traffic subjected to higher percentage increases was presently bearing a disproportionate contribution to rail revenues, that the Commission refused to consider plaintiffs' cost study, that its findings in various respects were contradicted by the evidence, that it refused to give any weight to economic conditions and trends in northeastern agriculture, et cetera.

The Commission's motion to dismiss is based upon the face of the complaints. It necessarily admits for the purposes of this motion the truth of their allegations, in so far as those allegations are statements of fact rather than legal conclusions. Thus, although the Commission does not admit that it erred or that it acted illegally, arbitrarily or capriciously, it does admit that it did not take the procedural steps which plaintiffs say it should have taken, that it rejected proferred evidence which plaintiffs deem relevant, and the like. Nevertheless, the question remains

whether this court at this time should undertake to pass upon these matters and decide the merits of plaintiffs' claims.

It is clear that the general revenue order which the Commission made here was within its powers under 49 U.S.C. § 15a(2), in view of the impracticability of dealing with specific rates in a proceeding in which hundreds of commodities were involved.

United States v. *Louisiana*, 290 U.S. 70 (1933)
King v. *United States*, 344 U.S. 254 (1952)

As to the reviewability of the order, the Commission and the intervenor railroads rely primarily upon three decisions:

Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935)
Koppers Co. v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955)
Florida Citrus Commission v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd*, 352 U.S. 1021 (1957)
See also, Birmingham Slag Co. v. *United States*, 11 F. Supp. 486 (N.D. Ala. 1935)

These cases support the Commission's position here. They held in substance that the court will not entertain a suit to enjoin an order of the Commission in a general revenue proceeding when plaintiffs have not exhausted the remedy afforded them by Section 13 to seek an adjustment of the particular rates which affect them. The distinctions which the present plaintiffs attempt to draw between those cases and this one do not seem to us to be substantial or signif-

icant. The fundamental principle is the same. As the court said in *Koppers*:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits." 132 F. Supp. at 163.

It may be that in some of the cases cited plaintiffs aimed their attack more directly at the rates authorized by the general revenue order than do the present plaintiffs and intervenors. But the fact remains that in this case as in the others plaintiffs' real concern is with the increased rates which the order authorized on the commodities in which they are interested. If the Commission had not approved a general increase on coal and grain and feed, plaintiffs and intervenors would not be here complaining of the procedures followed by the Commission.

And it is as true in this case as in the others that by pursuing their remedy in a Section 13 proceeding, plaintiffs and intervenors may achieve the relief that they are really seeking, *i.e.*, a reduction in the particular rates on coal and grain and feed. This court cannot assume that the

Commission will deny them relief nor can it relieve them from the necessity of seeking it because to do so may be time-consuming and expensive. In our opinion, this is what the statutory scheme requires. Until this step has been taken, plaintiffs have not suffered any real injury. Only if and when their application under Section 13 is rejected will the Commission's action be ripe for judicial review.

We have carefully considered plaintiffs' argument that it is unjust to deny them a review of the Commission's general revenue order at this time because this is their only opportunity to have it reviewed. They maintain that in a subsequent Section 13 specific rate proceeding, the Commission will not consider their objections to the procedures followed in the prior general revenue proceeding and hence that they will be forever foreclosed from obtaining a judicial determination of the merits of the claims which they now assert. By way of justification of their fears, they cite *Koppers Co.* v. *Chesapeake & Ohio Ry.*, 303 I.C.C. 383 (1958), a proceeding before the Commission subsequent to the court's refusal to review the Commission's general revenue order in *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955), previously discussed. In the course of its opinion, the Commission said, with reference to the prior general revenue order:

> "Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." 303 I.C.C. 387.

We do not attempt, of course, to pass upon the propriety of this ruling of the Commission in the *Koppers* case. It is enough to say that in the case before us, we believe that plaintiffs' fears, however natural they may be under the circumstances, are unfounded. The general revenue order authorizing the overall increases is a necessary foundation or starting point for any subsequent determination of rates specifically applicable to plaintiffs. We see no reason why, upon making a proper record before the Commission in a Section 13 proceeding, plaintiffs cannot preserve the objections which they now assert to the procedure leading up to the general revenue order. We believe that an adverse ruling of the Commission on these objections should be reviewable by a court upon its review of the Commission's final order in the Section 13 proceeding. Although independent research by the court on this subject has revealed no decision directly in point, it is our view that an analogy may be found in cases involving the review of the Commission's order under Section 13(4) with regard to intrastate rates in which criticisms of a prior general order involving interstate rates were considered by the court.

See, e.g., Illinois Commerce Commission v. *United States*, 292 U.S. 474 (1934)
North Carolina v. *United States*, 325 U.S. 507 (1945)
Tennessee v. *United States*, 113 F. Supp. 634 (M.D. Tenn. 1953), *aff'd*, 346 U.S. 891 (1953)

In any event, we are satisfied, for the reasons previously mentioned, that the statute does not contemplate an attack upon the general revenue order at this stage.

The Commission's motion is granted. The action is dismissed for failure to state a claim.

So ordered.

Dated: October 28, 1969

IRVING R. KAUFMAN
U. S. C. J.

DUDLEY B. BONSAL
U. S. D. J.,

EDWARD C. MCLEAN
U. S. D. J.

Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I, Sheila H. Marshall, an associate attorney in the firm of Messrs. LeBoeuf, Lamb, Leiby & MacRae, of which Cameron F. MacRae, Esq., attorney of record for Appellants herein is a partner, depose and say that on the 16th day of January, 1970, I served copies of the foregoing Jurisdictional Statement on the following, all of whom were parties to the action in the court below, by first class mail, postage prepaid.

United States of America	HON. ERWIN N. GRISWOLD Solicitor General, Department of Justice, Washington, D. C. 20530
	HON. WHITNEY NORTH SEYMOUR, JR. U.S. Attorney for the Southern District of New York U.S. Courthouse Foley Square New York, New York 10007
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/s/ SHEILA H. MARSHALL

Sheila H. Marshall

Sworn to before me
this day of January, 1970

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Notary Public